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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES NEIL MOEN,)	
)	
Petitioner-Appellant,)	S.Ct. No. 40600
)	
vs.)	
)	
STATE OF IDAHO,)	D.Ct. No. 2011-3442
)	(Kootenai County)
)	
Respondent.)	
_____)	

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE MICHAEL J. GRIFFIN
Presiding Judge

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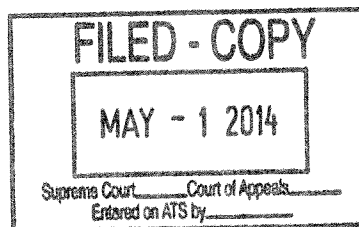


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II. ARGUMENT

A. **The District Court Erred in Summarily Dismissing Mr. Moen's Petition for Post-Conviction Relief Because He Presented an Issue of Material Fact as to Whether He Was Entitled to Relief**

1. **Mr. Moen established an issue of material fact regarding whether he was entitled to relief due to the district court's failure to *sua sponte* order a psychological evaluation for sentencing and its decision to proceed with the jurisdictional review notwithstanding the unavailability of the scheduled psychological evaluation and other supporting documentation**

Mr. Moen's mental condition was undisputedly a significant factor in determining his sentence. By sentencing Mr. Moen (both initially and following the period of retained jurisdiction) without the benefit of a psychological evaluation, the district court deprived Mr. Moen of a full opportunity to present favorable evidence and to explain and rebut adverse evidence. The district court's decision also twice deprived the Idaho Department of Correction ("IDOC") of necessary information to treat Mr. Moen's mental illness. As a result, Mr. Moen became suicidal and was unable to participate in programming or have a meaningful opportunity for probation or parole. Accordingly, the district court's violation of Mr. Moen's right to due process and I.C. § 19-2522 entitles him to post-conviction relief and the district court erred in summarily dismissing his petition.

a. **the need for further evaluation of Mr. Moen's mental health implicated due process protections**

In response, the state asserts Mr. Moen's arguments are foreclosed by *State v. Clinton*, 155 Idaho 271, 311 P.3d 283, 285 (2013) and *State v. Coassolo*, 136 Idaho 138, 143, 30 P.3d 293, 298 (2001), which were not cited in the Appellant's Brief. Respondent's Brief p. 6 ln. 1. *Clinton* relies on *State v. Carter*, 155 Idaho 170, 307 P.3d 187 (2013), which is cited in the

Appellant's Brief. Both cases held that the district court's failure to *sua sponte* order the I.C. § 19-2522 evaluation did not violate a constitutional right and thus did not constitute a fundamental error reviewable for the first time on appeal. From the opinions, it does not appear that either appellant argued that the district court's failure to order psychological evaluations in those cases violated due process and the cases do not hold that failure to order such an evaluation can never rise to a violation of due process. Neither *Carter* nor *Clinton* foreclose Mr. Moen's argument.

Coassolo is controlling precedent and was not addressed in the Appellant's Brief due to oversight. In *Coassolo*, the Court held that the "constitutional protections required at sentencing are not applicable to the retained jurisdiction program because sentencing occurs before the period of retained jurisdiction, not when jurisdiction is relinquished. *Coassolo*, 136 Idaho at 142-43, 30 P.3d at 297-98. Pursuant to *Coassolo*, the possibility of probation at the end of retained jurisdiction provides a mere hope that the benefit will be obtained and courts are thus not required to hold a hearing before determining whether to relinquish jurisdiction. *See also State v. Goodlett*, 139 Idaho 262, 264, 77 P.3d 487, 489 (Ct. App. 2003) (*Coassolo* holds there is no constitutional requirement of a hearing either at the correctional facility or in the trial court before the court determines whether to relinquish jurisdiction or to place the defendant on probation).

The instant circumstance is distinguishable for two reasons. First, in sentencing Mr. Moen, the district court recommended that IDOC conduct a psychological evaluation and advised counsel to arrange for one to be completed for the retained jurisdiction review in the event IDOC did not follow the recommendation. The district court thus found that further information

regarding Mr. Moen's mental health was necessary to its final sentencing determination.

Because the district court's sentencing determination was incomplete, the due process protections associated with sentencing remained applicable.

Second, the district court conducted a hearing prior to relinquishing jurisdiction in which it expressed that controlling law required a psychological evaluation and continued the hearing so that the evaluation could be arranged. Tr. Vol. 4 (35907) p. 16, ln. 19 - p. 17, ln. 14 (expressing opinion that *State v. Banbury*, 145 Idaho 265, 268, 178 P.3d 630, 633 (Ct. App. 2007) required a psychological evaluation based on the district court's concerns regarding treatment that should be recommended during probation or incarceration). Once a state law creates a right that implicates a person's liberty, the individual possessing this right is entitled to "those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated." *Taylor v. State*, 145 Idaho 866, 871, 187 P.3d 1241, 1246 (Ct. App. 2008), citing *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Because the district court actually conducted a hearing and found that a psychological evaluation was necessary to its final sentencing determination, Mr. Moen was entitled to procedural due process during those proceedings. Cf. *Taylor*, 145 Idaho at 871, 187 P.3d at 1246 (the district court did not create a liberty interest in having a hearing within the period of retained jurisdiction by "simply scheduling a hearing").

Moreover, *Coassolo* is wrongly decided and should be overturned. As explained by the dissent:

When the district court utilizes retained jurisdiction, sentencing by the court has not been completed. The district court may drop jurisdiction, in which case the defendant serves the sentence originally imposed. On the other hand, the district

court may modify the sentence by shortening either the total sentence or the mandatory term that must be served. In most instances the primary consideration is whether to grant probation and suspend the balance of the sentence.

Coassolo, 136 Idaho at 145, 30 P.3d at 300 (Justice Schroeder, dissenting). The district court's role in sentencing is not complete until the judge makes a decision at the end of the retained jurisdiction [and an amendment to the statute did not] eliminate the due process right of a defendant to be heard in a meaningful manner before final sentence is pronounced.” *Coassolo*, 136 Idaho at 145, 30 P.3d at 300 (Justice Schroeder, dissenting); *see also State v. Statton*, 136 Idaho 135, 138, 30 P.3d 290, 293 (2001) (Justice Schroeder, dissenting) (anything that is in the nature of an addendum to the presentence report invokes the defendant's right to be heard prior to final sentencing by the court).

b. Mr. Moen's opportunity to present favorable evidence was not meaningful

The state notes that defense counsel denied the need for further testing at Mr. Moen's change of plea hearing and the retained jurisdiction hearing was continued to allow for further evaluation. Respondent's Brief, p. 5. The state thus contends that Mr. Moen was “given the opportunity to examine and respond to the psychological evidence presented at sentencing and to provide additional psychological evidence.” *Id.* As discussed below, counsel was ineffective for failing to ensure an adequate mental health evaluation was obtained prior to sentencing and failing to inform the district court that an evaluation was scheduled at the hearing in which the district court relinquished jurisdiction.

Moreover, due process requires a *meaningful* opportunity to be heard. After counsel denied the need for a psychological evaluation, the district court received the substance abuse

evaluation, which opined that Mr. Moen's scores on the various clinical measures indicated mental health problems and that "Mr. Moen's needs would best be served by obtaining a comprehensive medical evaluation and following all psychopharmacologic recommendations." CR p. 95. At sentencing, the district court indicated that it did not understand why counsel had not requested an evaluation and that it could have ensured Mr. Moen received medication before embarking on his rider. The district court recommended that IDOC provide an evaluation but advised counsel to schedule one before the jurisdictional review because it doubted IDOC would provide the recommended evaluation.

A full evaluation, including diagnoses and treatment recommendations, was necessary to provide the district court with critical information necessary to fashion an appropriate sentence for Mr. Moen. Mr. Moen wished to provide such information to the district court and, indeed, had scheduled and paid for a psychological evaluation prior to the jurisdictional review. The district court was aware of the need for a mental health evaluation and that one was required by statute but nonetheless sentenced Mr. Moen without one's benefit.

Accordingly, in this instance, the district court's violation of I.C. § 19-2522 violated Mr. Moen's right to due process. The district court thus erred in dismissing his petition for post-conviction relief.

2. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel

a. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during plea negotiations and entry of plea

The state could support neither the persistent violator allegation nor battery charges and it

would have been rational for Mr. Moen to reject the Rule 11 agreement. Accordingly, Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during plea negotiations or, at least, presented the possibility of the claim such that he was entitled to the assistance of counsel.¹

The state responds that dismissal was appropriate as “trial counsel negotiated a plea agreement regarding three felony charges whereby Moen pled guilty to one felony (DUI), the state dismissed a second felony (intimidating a witness), and the third (domestic battery) was reduced to a misdemeanor so that no additional time would have to be served.” Respondent’s Brief, p. 8. However, the state did *not* reduce a felony domestic battery to a misdemeanor as part of the plea agreement. Instead, the state reduced the attempted strangulation to misdemeanor domestic battery in July 2008 – before Mr. Moen was arrested for felony DUI – because it realized it could not prove the felony charge. CR 303-306; A 251, 266-67. The state then reduced the misdemeanor domestic battery to a simple misdemeanor battery as part of the Rule 11 agreement.

According to the state, Mr. Moen “fails to cite any evidence that any alleged defects in the plea agreement were the fault of counsel and does not even address the relevant prejudice question of whether Moen would have reasonably rejected the plea agreement and demanded a trial on the three felonies.” Respondent’s Brief, p. 8. However, the transcripts in the underlying

¹ As noted in Mr. Moen’s opening brief, the district court did not specifically address any of the documentation Mr. Moen submitted in support of his petition and it is thus unclear whether the district court considered the facts alleged in the documentation insufficient or whether it declined to consider those facts at all because it found the documentation did not set forth admissible evidence. To the extent Mr. Moen’s documentation is found to not constitute admissible evidence, it illustrates the possibility of a valid claim entitling him to counsel.

criminal proceedings illustrate that Mr. Moen continually articulated his innocence, exhibited difficulty understanding the proceedings and only gave the required responses after being urged and coached by his attorney Tr. Vol 2 (35907) p. 24, ln. 1 - p. 29, ln. 8 (change of plea); p. 67, ln. 10 - p. 68, ln. 25 (sentencing).²

Where a petitioner alleges a guilty plea is invalid due to counsel's failure to provide sufficient advice, the petitioner can obtain relief by demonstrating that a decision to not plead guilty would have been rational under the circumstances. *Padilla v. Kentucky*, 559 U.S. 356, ___, 130 S.Ct. 1473, 1485 (2010); *Hoffman v. State*, 153 Idaho 898, 905, 277 P.3d 1050, 1057 (Ct. App. 2012). In addition to Mr. Moen's continued expressions of innocence, the victim had recanted. *See e.g.* A 281, ln. 27-29. The record supports that it would have been rational to reject the plea agreement and insist on a trial. While Mr. Moen's assertion of innocence was specifically related to the battery and that sentence had expired, the district court and IDOC treated Mr. Moen as if he were a batterer in assessing his alleged danger to the community, restricting his communication with the supposed victim, Kim, and treatment recommendations such as anger management. Further, Mr. Moen alleged in post-conviction proceedings that counsel should have filed a motion to suppress in the DUI case because the stop of his vehicle was unsupported by probable cause and he did not have the requisite predicate offenses to enhance the DUI to a felony.

² Excerpts of the transcripts of the underlying criminal proceedings were attached to the pleadings. However, while counsel requested that the full transcripts be prepared, the district court did not rule on that request or specifically notice the full transcripts. To the extent full transcripts are needed to support Mr. Moen's claim and he thus has not sufficiently supported his claim for purposes of summary judgment, he has presented the possibility of a valid claim which requires remand for the appointment of counsel.

The record supports Mr. Moen's contention that counsel coerced him to plead guilty to the battery although knowing he was innocent. Accordingly, Mr. Moen presented an issue of fact (or at least the possibility of a valid claim) that he received ineffective assistance of counsel during negotiations and entry of plea.

b. Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel during the sentencing and jurisdictional review hearings

The record establishes that the attorney representing Mr. Moen at sentencing and the attorney representing him at the rider review knew that Mr. Moen's mental condition was highly significant for purposes of determining an appropriate sentence and treatment. Nonetheless, the attorneys permitted the district court to twice sentence Mr. Moen without first obtaining a full psychological report. Later psychological testing conducted by IDOC establishes that Mr. Moen suffers from serious mental illnesses including bipolar type schizoaffective disorder, generalized anxiety disorder and panic disorder, all of which are treatable with medication. Further, the record establishes that Mr. Moen's Rider, his ability to participate in programming after being sentenced to prison and his very life were compromised by his untreated mental health. Accordingly, Mr. Moen established an issue of fact as to whether he received ineffective assistance of counsel due to counsels' failure to object to proceeding with the sentencing and jurisdictional review hearings without an evaluation with the information required by I.C. § 19-2522.

According to the state, trial counsel strategically elected to pursue evaluations related to alcohol abuse and rehabilitation instead of mental health issues, which was a sound strategy because Mr. Moen suffered "from untreatable adjustment or personality disorders rather than

treatable mental illnesses.”³ Respondent’s Brief, p. 11.

Initially, the record does not support that trial counsel strategically elected to forgo a mental health evaluation. Instead, in light of the recommendation in the substance abuse evaluation, counsel asked the district court to order a psychological evaluation during the period of retained jurisdiction to explore whether medication was warranted. Tr. Vol. 2. (35907) p. 79 - p. 80, ln. 1. The district court expressed frustration that counsel had previously represented that no further evaluations were needed at the change of plea hearing because Mr. Moen could have been prescribed appropriate medication prior to embarking on his rider. *Id.* at p. 82, ln. 15-20. Counsel explained that the substance abuse evaluation, rather than the competency evaluation, recommended further evaluation and “so I would have to take responsibility.” *Id.* at 81, ln. 21 - p. 83, ln. 3.

Thus, rather than support that counsel elected to forgo further testing as a matter of strategy, the record illustrates that counsel’s conduct was the result of oversight. Even if it had been reasonable not to pursue further evaluation based on the Section 18-211 evaluation, it was unreasonable to not request further testing prior to sentencing upon receipt of the substance abuse evaluation and to allow Mr. Moen to embark on a rider without proper medication.

Moreover, Mr. Moen’s mental condition is treatable. In addition to a personality disorder, Mr. Moen suffers from bipolar type schizoaffective disorder, generalized anxiety disorder and panic disorder. Each of those conditions is generally responsive to medication. By allowing Mr. Moen to be sentenced without proper diagnoses, counsel allowed the district court

³ While personality disorders are difficult to treat, an adjustment disorder is simply a temporary mood disorder caused by a stressful event, which usually does not last longer than six months. See <http://www.nlm.nih.gov/medlineplus/ency/article/000932.htm>.

and IDOC to assume Mr. Moen's behavioral difficulties resulted from solely a personality disorder rather than treatable conditions.

The state also contends that Mr. Moen "presented no evidence that the tactical decision to pursue a sentencing strategy of addressing his addictions rather than his personality disorders was unreasonable or that he suffered any prejudice. Respondent's Brief, p. 11. The state acknowledges that Mr. Moen submitted a page from a psychological evaluation completed in 2009 but notes Mr. Moen did not submit the entire evaluation and suggests it is unclear whether the evaluation was completed after the district court relinquished jurisdiction. As discussed below and in his Opening Brief, Mr. Moen and his attorney repeatedly attempted to secure additional mental health records including the entire evaluation. The record also clarifies that the evaluation was conducted in prison. In his second motion for additional time, the second attorney told the district court that he knew "that psychological records exist with the Idaho Department of Corrections as counsel has been provided from Moen the last page of a report from a psychological evaluation performed on Moen while in prison. A 106.

The state also urges that counsel could not have been ineffective for failing to obtain a psychological evaluation because the single page from the evaluation included unfavorable remarks such as that Mr. Moen's mood and personality disorders made him impulsive and aggressive. Respondent's brief, p. 12. However, this description of Mr. Moen's behavior would not have been new information for the district court. *See* Tr. Vol. 4 (35907) p. 114, ln. 12-24 (district court comments in relinquishing jurisdiction that Mr. Moen had extreme difficulty listening and was a danger to society with his drinking and violence). Thus, it would not have been a reasonable strategic approach to forgo an evaluation because it would have described the

behavioral difficulties of which the district court was already aware.

Instead, proper evaluation would have informed the district court and IDOC that these behaviors emanated from treatable mental illness as well as a personality disorder. Such critical information would have allowed the district court and IDOC to see Mr. Moen's behaviors in a different light and address them appropriately. Mr. Moen repeatedly alleged that he was prejudiced by the lack of proper diagnoses by indicating that lack of treatment rendered him unable to meaningfully participate in his Rider and prison programming, which placed his life at risk by contributing to suicidal behavior and prolonging his incarceration.

The state claims that the letter establishing he had scheduled and paid for a psychological evaluation prior to the district court relinquishing jurisdiction does not support his ineffective assistance of counsel claim because "at best, the timing of events indicates any failure to obtain an evaluation was not the fault of counsel."⁴ However, Mr. Moen faulted his attorney for not arranging for a state-paid psychological evaluation in preparation for jurisdictional review as instructed by the district court and failing to inform the district court that the evaluation was pending and to seek a set over prior to proceeding with that hearing. It was unreasonable for

⁴ The state alleges that Mr. Moen failed to establish that the Sixth Amendment right to counsel applies at a jurisdictional review hearing but assumes, for purposes of its brief, that there is a statutory right imposing similar standards of competence. Respondent's Brief p. 11, ln. 2. The district court determines whether to place a defendant on probation or to send the defendant to prison at a jurisdictional review hearing. Where a hearing is granted, counsel's assistance is critical in providing important information to the district court. The Court of Appeals has addressed ineffective assistance of counsel claims at jurisdictional review hearings in the past. *See Taylor v. State*, 145 Idaho 866, 872, 187 P.3d 1241, 1247 (Ct. App. 2008) (finding that counsel did not perform deficiently by failing to secure the update of Taylor's psychosexual evaluation before the court's jurisdiction ceased because counsel succeeded in presenting to the court the key information regarding Taylor's amenability to probation within the period of retained jurisdiction).

counsel to not even inform the district court that an evaluation had been scheduled and in proceeding with the hearing without objection.

3. Mr. Moen established an issue of material fact as to whether he was entitled to relief because the district court violated his right to due process by accepting an invalid plea and violating the plea agreement

The district court's addition of the Level A requirement was Mr. Moen's undoing on the Rider. After IDOC refused to follow either the district court's recommendation for Level A or a mental health evaluation, Mr. Moen believed he would be sent prison. His anxiety and mania in combination with the district court's indication he had no chance at probation absent Level A interfered with his ability to accept placement in Level B. Mr. Moen's counselor recommended that the district court relinquish jurisdiction in large part as a result of Mr. Moen's efforts to secure placement in Level A. Therefore, the district court's unconstitutional imposition of additional terms in the plea agreement prejudiced Mr. Moen and deprived him of a meaningful opportunity to succeed on his Rider.

In response, the state notes that under Idaho law, due process does not apply to a period of retained jurisdiction. As argued above, *Coassolo* is distinguishable from the instant circumstance and, in any event, should be overturned.

B. The District Court Violated Mr. Moen's Right to Due Process and Abused Its Discretion by Denying Him of a Meaningful Opportunity to Present His Post-Conviction Claims, Allowing Counsel to Withdraw and Refusing to Appoint Replacement Counsel

The district court initially determined that Mr. Moen was entitled to counsel. Difficulties and conflicts arose with the attorneys appointed to represent Mr. Moen. In moving to withdraw, the last attorney appointed informed the district court that Mr. Moen had viable claims and was

entitled to counsel but that he and Mr. Moen could not agree on the viability of other claims. As discussed above and noted in Mr. Moen's Opening Brief, the claims addressed in Section I.A present the possibility of valid claims even if this Court disagrees that Mr. Moen presented issues of material fact or that some of the documentation he presented does not constitute "admissible" evidence. Mr. Moen's other materials also raise at least the possibility of valid claims. Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in failing to re-appoint counsel on those claims.

According to the state, "Mr. Moen had the benefit of two different attorneys for over 18 months" and, thus, "cannot claim that any lack of factual development of his pleadings was because of lack of counsel." Respondent's Brief, p. 21. The state's suggestions that counsel could not have assisted with further factual development is disproved by the record.

Rather, Mr. Moen and his attorneys repeatedly attempted to develop the record, especially with information illustrating the prejudice Mr. Moen suffered from the lack of proper psychological evaluation. For instance, Mr. Moen filed a "Motion Requesting Mental Health Expert Testimony" to address the probable impact of inadequate diagnosis and treatment of his bi-polar type schizoaffective disorder, personality disorders and how the lack of such treatment led to the development of suicidal tendencies. A 39-41. In a second request for additional time to supplement Mr. Moen's petition, the second attorney appointed to represent Mr. Moen explained that he had still not received the requested psychological records from IDOC, including the entire 2009 evaluation, and that those records were critical to Mr. Moen's claims. A 105-107. The third attorney appointed to represent Mr. Moen indicated that he had prepared a motion to have Mr. Moen transported to the state hospital for mental health treatment but that he

had not filed the motion because he was working on getting a hearing date. A 137. The third attorney also sought leave to file an amended petition and filed a motion to produce the transcripts of Mr. Moen's arraignment and bond reduction hearing; change of plea hearing, sentencing hearing and the jurisdictional review hearings. A 118-119, 122-123.

As noted by the state in arguing Mr. Moen failed to produce evidence of prejudice, the remainder of the 2009 psychological evaluation was never received and Mr. Moen did not produce other psychological records. No expert was appointed to opine regarding Mr. Moen's diagnoses of his bi-polar type schizoaffective disorder, personality disorders and the transcripts were never produced. The district court neither ruled on the third attorney's motion to amend the petition nor addressed Mr. Moen's multiple attempts to amend his claims. As noted in Mr. Moen's Opening Brief, it was profoundly unjust to disregard Mr. Moen's request for assistance in developing the factual basis for his claims and then refuse to re-appoint counsel because such a factual basis was lacking.

The state also asserts that Mr. Moen was not entitled to a hearing on his attorney's motion to withdraw because the applicable standard is whether the district court correctly determined that Mr. Moen had failed to set forth the possibility of a valid claim. The state is correct insofar as his presence at the hearing on the attorney's motion to withdraw was not directly pertinent to whether there was the possibility of a valid claim.

However, in its order allowing the withdrawal of the third attorney, the district court erroneously found that Mr. Moen had refused to participate in the hearing. To the extent the district court's decision to allow counsel to withdraw and to refuse to appoint a replacement is based on counsel's statements at that hearing, Mr. Moen should have been provided an

opportunity to participate. The district court's findings in concluding that Mr. Moen waived that right were clearly erroneous.

Mr. Moen presented the possibility that he was harmed by the cumulative effect of the many violations.⁵ Accordingly, the district court violated Mr. Moen's right to due process and abused its discretion in refusing to re-appoint counsel.

C. The District Court Violated Mr. Moen's Right to Due Process in Dismissing Several of the Claims Raised by Mr. Moen in Post-Conviction Proceedings *Sua Sponte* and Without Prior Notice

In addition to those claims raised in the original and supplemental petitions for post conviction relief, Mr. Moen attempted to raise several additional claims in his pro se submissions, both those submitted while represented and after the district court forced him to proceed pro se. Neither the state's motion nor the district court's notice addressed the claims Mr. Moen raised pro se. Even if the district court was not obligated to address the documents Mr. Moen submitted while still represented, it was obligated to address the later submissions raising the same issues, which were filed after the district court deprived Mr. Moen of counsel. Accordingly, Mr. Moen's right to due process was violated when the district court *sua sponte* dismissed several of his claims without notice and the case must be remanded to provide Mr. Moen with a meaningful opportunity to cure any deficiencies.

Citing to *Kelly v. State*, 149 Idaho 517, 236 P.3d 1277 (2010), the state urges that "not only was it not error for the court to not consider Moen's attempts to raise new claims, it would have been error for it to do so" because those claims were not raised in the "pleadings."

⁵ Because the State does not address the specific claims in this section, no reply is warranted.

Respondent's Brief, p. 26. The instant circumstance is quite different than that in *Kelly*. There, the petitioner raised a prosecutorial misconduct claim in a document titled "Brief and Affidavit in Support of Petition for post-conviction relief." The Court found:

This document was not signed or notarized and, therefore, does not constitute an affidavit under the law. *See Black's Law Dictionary* 23 (3rd pocket ed. 2006) (defining affidavit as a "voluntary declaration of facts written down and sworn to by the declarant himself before an officer authorized to administer oaths, such as a notary public"). It is clearly established under Idaho law that a "cause of action not raised in a party's pleadings may not be considered on summary judgment nor may it be considered for the first time on appeal." *Maroun v. Wyreless Sys. Inc.*, 141 Idaho 604, 613, 114 P.3d 974, 983 (2005) (quoting *Edmondson v. Shearer Lumber Prods.*, 139 Idaho 172, 178, 75 P.3d 733, 739 (2003)). As Kelly failed to raise a claim for prosecutorial misconduct . . . in his petition or supporting affidavit, the district court erred in considering such a claim at summary dismissal proceedings, and we shall not consider it.

Kelly, 149 Idaho at 523-24, 236 P.3d at 1283-84.

Here, prior to withdrawing, the third attorney filed a motion for leave to amend the petition and motion to produce a number of transcripts from the underlying criminal proceedings. A 118-119; 122-23. After hearing that his attorney had been granted leave to withdraw, Mr. Moen submitted a "Motion For Rehearing On Summary Disposition To Preserve Thirty Constitutional Violations In P.C.R. That Attorney Failed To Do," which attempted to raise several issues and included Mr. Moen's notarized signature. A 148. Mr. Moen attached the second supplemental petition for post-conviction relief that the third attorney had drafted and Mr. Moen had signed. A 157-186. After the district court denied the motion for re-hearing, Mr. Moen again raised his claims in a notarized document titled Motion to Dismiss Prosecution's 'Notice of Intent to Dismiss' And Moves for Evidentiary Hearing. A 329-337. Mr. Moen had also repeatedly sought leave to amend the pleadings to add those claims while represented.

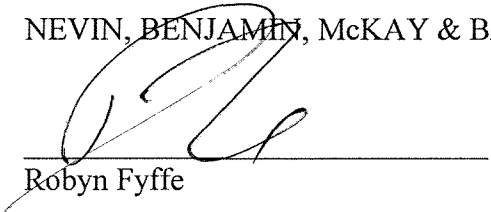
Thus, while Mr. Moen's additional claims were not in the petition before the district court, they were notarized and submitted while motions for leave to amend the petition were pending. Additionally, Mr. Moen had attempted to raise these claims throughout the proceedings and, in fact, had repeatedly faulted his attorneys for failing to raise those same claims. Mr. Moen clearly submitted those claims in response to the district court's notice of intent to dismiss in attempt to illustrate that he was entitled to counsel because he had raised the possibility of valid claims. Under these circumstances, the district court was obligated to consider all the claims raised by Mr. Moen.

III. CONCLUSION

For all the reasons set forth above and in his Opening Brief, Mr. Moen respectfully asks this Court to reverse the district court's judgment dismissing his post-conviction claims and to remand this case for further proceedings.

Respectfully submitted this 1 day of May, 2014.

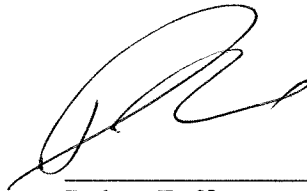
NEVIN, BENJAMIN, MCKAY & BARTLETT LLP



Robyn Fyffe

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1 day of May 2014, I caused two true and correct copies of the foregoing to be mailed to: Office of the Attorney General, P.O. Box 83720, Boise, ID 83720-0010.

A handwritten signature in black ink, appearing to read 'Robyn Fyffe', is written over a horizontal line.

Robyn Fyffe